71-818

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED,
Plaintiff-Petitioner,

vs.

STANLEY RESOR, Secretary of the Army, et al.,
Defendants-Respondents.

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED,
Plaintiff-Petitioner,

vs.

MAXSON ELECTRONICS CORPORATION,
Intervening Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

CHARLES M. CRUMP
APPERSON, CRUMP, DUZANE & MAXWELL
Suite 2610, 100 North Main Building
Memphis, Tennessee
Attorneys for Petitioner

Of Counsel

HUDSON, CREYKE, KOEHLER, BROWN & TACKE
1744 R Street, N.W.
Washington, D. C. 20009

ALLEN T. MALONE
APPERSON, CRUMP, DUZANE & MAXWELL
Suite 2610, 100 North Main Building
Memphis, Tennessee 38103

VINCENT J. O'REILLY
DONALD V. BAKEMAN
One Old Country Road
Carle Place, New York 11514

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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In the Supreme Court of the United States

OCTOBER Term 1971

No. .....

Pace Co., Division of Ambac Industries, Incorporated,
Plaintiff-Petitioner,

vs.

Department of the Army of the United States of America and Stanley Resor, Secretary of the Army, United States Army Materiel Command and Henry Miley, Commanding General, United States Army Munitions Command, Joliet, Illinois, and Peter G. Olinchuck, Commanding General, Ammunition Procurement and Supply Agency, Department of the Army, and Peter G. Olinchuck, Commanding General, and Edward F. Hill, Procuring Contracting Officer,
Defendants-Respondents.

Pace Co., Division of Ambac Industries, Incorporated,
Plaintiff-Petitioner,

vs.

Maxson Electronics Corporation,
Intervening Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Pace Co., Division of AMBAC Industries, Incorporated, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cases on December 9, 1971.

OPINIONS BELOW

Copies of the Opinion of the District Court for the Western District of Tennessee, Western Division, Cause No. C-71-391 (as yet unreported); the Preliminary Injunction issued by the District Court; the Order Overruling Defendants' Motion for Stay of the Injunction Pending Appeal; the Per Curiam Opinion of the Court of Appeals for the Sixth Circuit, Cause Nos. 71-1974 and 71-1975 (as yet unreported); and the Order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing and Defendants' Motion to Accelerate Mandate and Ordering that issuance of the Mandate be delayed until the 29th day of December, 1971, to afford the Petitioner an opportunity to present the matter to this Honorable Court, are all appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 9, 1971. Petitioner's Petition for Rehearing and Defendants' Motion to Accelerate Mandate were denied by Order filed by the Court of Appeals on December 15, 1971. The Court further ordered that the issuance of the Mandate be delayed until the 29th day of December, 1971, to afford the Petitioner an opportunity to present the matter to Mr. Justice Potter Stewart, the Circuit Justice for the Sixth Circuit. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

The single issue of overriding public importance presented by this case concerns the scope of judicial review of agency action under the Administrative Procedure Act with respect to an attempt by the Department of the

Army to award a munitions contract not in accordance with law.

The District Court found that under the authority of **Scanwell Laboratories, Inc. v. Shaffer,** 424 F.2d 859 (D.C. Cir. 1970), it had jurisdiction to review the determination by officers of the Department of the Army to award a munitions contract to Maxson Electronics Corporation, Intervening Defendant. Finding that the bid by Maxson varied materially from the terms of the Invitation for Bids, in violation of the Armed Services Procurement Act (10 USC §2305) and Regulations thereunder, requiring that bids be responsive to the IFB, the District Court enjoined the award of the contract to Maxson under the IFB.

The above issue presented by this case involves four questions:

(a) **Is there any exception to the requirements of the Armed Services Procurement Act (10 USC, § 2305) or to the scope of judicial review under the Administrative Procedure Act (5 USC, § 706) with respect to munitions contracts awarded by the Department of the Army.**

(b) **Did the District Court have jurisdiction of the subject matter and did Pace have standing and legal interest to maintain its suit for declaratory judgment and injunctive relief?**

(c) **Did the District Court abuse its discretion in granting the Preliminary Injunction and in refusing to stay or vacate the Injunction?**

(d) **Did the Court of Appeals abuse its discretion in directing the District Court to vacate its Preliminary Injunction, solely on the basis of affidavits representing that the National welfare will in some manner be materially affected by the Injunction, whereas the In-**

junction only enjoins an *UNLAWFUL* award to Maxson, and does not prevent the Governmental Defendants from obtaining the 81MM cartridges in a *LAWFUL* and even more expeditious manner than by award of the contract to Maxson?

STATUTES AND REGULATIONS

Statutes and Regulations cited herein are quoted below:

Administrative Procedure Act, 5 USC, §§ 702 and 706:

"§ 702 *Right of review.* A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

"§ 706. *Scope of review.* To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall——

"* * *

"(2) hold unlawful and set asitle agency action, findings, and conclusions found to be——

"(A) arbitrary, capricious, an abuse of discretion, **or otherwise not in accordance with law;**

"* * * * * * *

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." [Emphasis Added.]

Armed Services Procurement Act, 10 USC, §§ 2304(a)(2) and 2305:

"§ 2304. *Purchases and contracts: formal advertising; exceptions*

"(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if——

* * *

"(2) the public exigency will not permit the delay incident to advertising;"

"§ 2305. *Formal advertisements for bids; time; opening; award; rejection*

"(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

"(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

"(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder **whose bid conforms to the invitation** and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest. . . ." [Emphasis Added.]

Armed Services Procurement Regulations, 2-301(a); 2-404.1(a)(b) and (viii); and 2-404.2(a) and (b):

"§ 2-301. (a) **To be considered for award, a bid must comply in all material respects with the invitation for bids** so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained." [Emphasis Added.]

"§ 2-404.1 *Cancellation of Invitation After Opening.*

"(a) **The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid** unless there is a compelling reason to reject all bids and cancel the invitation. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modifications or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule, after opening, an invitation for bids should not be canceled and readvertised due solely to increased requirements for the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

"(b) When it is determined prior to award but after opening that the requirements of 1-1203 (relating to the availability and identification of specifications) have not been met, the invitation for bids shall be canceled. Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that——

* * * * * * *

"(viii) for other reasons, cancellation is clearly in the best interests of the Government." [Emphasis Added.]

"§ 2-404.2 *Rejection of Individual Bids.*

"(a) **Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.**

"(b) **Any bid which does not conform to the specifications contained or referenced in the invitation for bids shall be rejected** unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation. . . ." [Emphasis Added.]

STATEMENT OF THE CASE

The Plaintiff below and Petitioner herein is Pace Co., Division of AMBAC Industries, Incorporated. AMBAC is a New York corporation and Pace Co. is a separate division having its principal office in Shelby County, Tennessee. All Defendants are officials and agencies with various duties in the Department of the Army of the United States of America. Maxson Electronics Corporation is the Intervening Defendant below.

The United States Army, through its Munitions Division in Joliet, Illinois, issued an Invitation for Bids, dated June 21, 1971, for the procurement and delivery of a quantity of 81MM illuminating cartridges, and Petitioner, Maxson, and seven others submitted bids thereunder. The Invitation for Bids set forth requirements and specifications, including reference to technical instructions requiring that they be shipped as unitized loads strapped to pallets. The specifications for the pallets given in the technical instructions required, among other things, a minimum thickness of the pallet of 6⅛" providing 4 x 4 blocks separating

the deck of the pallet from the bottom cross-ties, thereby permitting space for the prongs of the fork-lifts.

The bids were opened on August 2, 1971, and Petitioner was the low bidder on the unit price per cartridge. Pursuant to regulations, the Contracting Officer caused an analysis of the bids to be made, including a consideration of transportation costs based upon data furnished by bidder. In submitting its data, Maxson deliberately underestimated the size of the pallets, showing them to be of a 4" thickness, rather than the 6⅛" thickness required in the technical drawings referred to in the IFB. When this erroneous factor was applied to the unit price, it caused the Defendant Contracting Officer to determine that the bid should be awarded to Maxson.

Petitioner protested the ruling on the ground that Maxson's bid was non-responsive; varying materially from the specifications in the IFB, and, thus, invalid. The contentions of the Petitioner were overruled by the Procuring Contracting Officer, who, while stating he will require Maxson's pallets to conform to the 6⅛" specifications of the IFB, despite Maxson's bid, determined Maxson's bid to be lowest-responsive bid, contrary to previous Comptroller General Opinions squarely in support of Petitioner's contentions.

The Petitioner filed suit for review of the aforesaid agency action under the Administrative Procedure Act, 5 USC § 702 and 706, shortly after the Contracting Officer's determination. In a Memorandum Opinion filed October 26, 1971, the United States District Court found that it had jurisdiction to grant the relief sought by the Plaintiff; that the relief sought was within the scope of review of the United States District Court; and that the Plaintiff had standing. After a full hearing, the Court found that there was no rational basis for the Defendants

to award a contract to Maxson Electronics Corporation, the Intervening Defendant; that such an award would be an abuse of discretion, would constitute agency action which is arbitrary, capricious and not in accordance with law, and would violate the Armed Services Procurement Regulations; and that Plaintiff would be irreparably injured in the event the said contract is awarded to Maxson. On these facts, the Court issued a Preliminary Injunction, enjoining the Defendants from awarding the contract to Maxson Electronics Corporation. The District Court also denied the Defendants' subsequent Motions for Stay of the Injunction, finding that **"the urgency is not as great as contended by the Defendants"** and that **"Defendants have other avenues of procuring the shells, such as re-evaluating existing bids, or calling for new bids in accordance with a condition in the Invitation to Bid."** (Order on Motion to Suspend Injunction Pending Appeal and Motion to Require Giving of Security, page 2, filed October 29, 1971.)

On appeal by the Defendants, to the Court of Appeals for the Sixth Circuit, the Defendants filed Motions for Summary Reversal, or, Alternatively, for Stay Pending Appeal. Following submission of briefs and affidavits and a hearing for oral argument on December 6, 1971, at which all of the parties were represented by counsel, the Court of Appeals held in its Per Curiam Opinion, decided and filed December 9, 1971, as follows:

> "... We conclude that the District Court abused its discretion in not vacating the Injunction upon the representation by the Secretary of the Army that the national welfare will be materially affected by the Injunction. On the basis of the affidavits on file, we find the National interest to be of such overriding importance as to render the failure to vacate the Injunction an abuse of discretion."

Petitioner filed a Petition for Rehearing, or, in the Alternative, for Stay Pending Certiorari, urging the Court to consider the uncontroverted fact that there are at least four *lawful* avenues open to the Department of the Army to assure an adequate supply of the 81MM cartridges which are the subject of the instant case, and that the District Court's Injunction affects only the award of a contract to a single bidder under the IFB, which, if awarded, would not be in accordance with law. These avenues are as follows:

(a) By award of a contract under the subject Invitation for Bid to "the responsible bidder *whose bid conforms to the Invitation* and will be the most advantageous to the United States, price and other factors considered. 10 USC § 2305(c).

(b) By cancellation of the subject IFB and readvertising. Armed Services Procurement Regulations 2-404.1(b)(viii).

(c) Through negotiation, if "public exigency will not permit the delay incident to advertising". 10 USC § 2304(a)(2).

(d) By exercise of option under the current Olin Contract DAAA09-71-C-0240 with option quantity of 467,532 items, of which the Army in November, 1971, exercised its option to procure 342,106 items.

On the same date that the Petitioner's Petition for Rehearing was filed, the Governmental Defendants filed a Motion to Accelerate the Mandate of the Court of Appeals.

On December 15, 1971, the Court of Appeals filed an Order denying Petitioner's Petition and Defendants' Motion, and further ordered that the issuance of the mandate be delayed until the 29th day of December, 1971, to afford the Petitioner an opportunity to present the matter to Mr. Justice Potter Stewart, the Circuit Justice for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. To Obtain Final Resolution of the Question of Permissible Scope of Judicial Review of Alleged Unlawful or Arbitrary Agency Action Under the Administrative Procedure Act, Particularly With Respect to the Awarding of Munitions Contracts.

Petitioner submits that the Per Curiam Opinion of the Court of Appeals for the Sixth Circuit represents a dangerous precedent in that it creates an exception to or suspends the requirements of the Armed Services Procurement Act, 10 USC § 2305, as well as the scope of judicial review under the Administrative Procedure Act, 5 USC § 706, with respect to all acquisitions of munitions by Governmental Agencies, **although no such exceptions were written into these laws by Congress.** Agencies of the Department of the Army, as other Government Agencies, must operate **in accordance with law,** and Petitioner submits that this Court should correct any notion that they may operate above the law merely by filing affidavits claiming urgency which patently does not exist.

2. To Resolve an Apparent Conflict Between the Courts of Appeals for the District of Columbia and the Sixth Circuit as to the Permissible Scope of Judicial Review Under the Administrative Procedure Act.

The Court of Appeals for the District of Columbia in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) later explained in *Steinthal and Company, Inc. v. Seamans*, ... F.2d ... (No. 24595 D.C. Cir. October 14, 1971) and *Wheelabrator Corporation v. Chaffee*, ... F.2d ..., Nos. 24705, 24729 (D.C. Cir., Opinion entered October 14, 1971) clearly recognizes the right of a disappointed bidder to seek review of agency action alleged to be "not

in accordance with law" under the Administrative Procedure Act, 5 USC § 706, where the action complained of is not discretionary. In so holding, the Court of Appeals for the District of Columbia recognized that the case of *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) had been overruled by the Administrative Procedure Act, as well as by subsequent decisions of the United States Supreme Court. It is submitted by the Petitioner that the effect of the holding of the Court of Appeals for the Sixth Circuit in this case would be to immunize the action of agencies in the Department of the Army from judicial review under the Administrative Procedure Act, thereby reinstating the rule in *Perkins v. Lukens Steel Co., supra*, at least in respect to munitions procurement, although neither the Congress nor the Courts have previously recognized such an exception. By granting this Petition for Writ of Certiorari, this Honorable Court will preserve the issues in this case for an appropriate ruling which will not only protect the Petitioner from this single instance of unlawful agency action, but also will protect and strengthen the competitive bidding process generally with respect to the awarding of Government contracts, and clarify the scope of review thereof by United States Courts.

3. To Preserve the Integrity of the Competitive Bidding Process With Respect to the Award of Government Contracts.

Congress has recognized that for overriding reasons of public policy, the competitive bidding process with respect to the award of Government contracts must be preserved. The "integrity of the competitive bid system" (ASPR Reg. 2-404.2) can only be preserved if agencies to whom the award of contracts is entrusted adhere strictly and unswervingly to the law and regulations governing the award of Government contracts, including the central requirement that all bids be *responsive* to the IFB *in all*

respects. Congress has clearly stated in the Administrative Procedure Act that where an agency fails in this regard, the United States Courts shall review and correct such agency action.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

CHARLES M. CRUMP
APPERSON, CRUMP, DUZANE
& MAXWELL
Suite 2610
100 North Main Building
Memphis, Tennessee 38103

By CHARLES M. CRUMP
Attorneys for Petitioner

Of Counsel.

HUDSON, CREYKE, KOEHLER,
BROWN & TACKE
1744 R Street, N.W.
Washington, D. C. 20009

ALLEN T. MALONE
APPERSON, CRUMP, DUZANE
& MAXWELL
Suite 2610, 100 North Main Building
Memphis, Tennessee 38103

VINCENT J. O'REILLY
DONALD V. BAKEMAN
One Old Country Road
Carle Place, New York 11514

APPENDIX 1

In the United States District Court for the Western District of Tennessee, Western Division

Pace Co., Division of Ambac Industries, Incorporated, Plaintiff, vs. Department of the Army of the United States of America and Stanley Resor, Secretary of the Army, et al., Defendants.	No. 71-391—Civil.

Memorandum Decision

(Filed Oct. 26, 1971)

This cause concerns a judicial review of determinations of officials of the United States Army in the matter of a procurement contract sought through an invitation to bids from appropriate suppliers.

The plaintiff is Pace Company, a Division of Ambac Industries, Inc. Ambac Industries, Inc., is a New York corporation and Pace Company is a separate division having its principal office in Shelby County, Tennessee. All defendants are government officials with various duties in the Department of the Army of the United States of America. The residences of the various defendants are in various states, depending upon the assignment of the officials.

The plaintiff seeks declaratory and injunctive relief pursuant to the Administrative Procedure Act, 5 USC.,

§701, *et seq.* Plaintiff as one of the bidders on a contract sought by the defendant Army procurement personnel, seeks to enjoin the award of the contract for the procurement of ammunition to Maxson Electronics Corporation primarily on the ground that Maxson's bid is not responsive and that the actions of the defendants, particularly the defendant Hill, as Procuring Contract Officer, are arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law, as defined in and interpreted under 5 USC, §706.

Plaintiff filed its complaint on September 30, 1971, and a temporary restraining order was issued on that date. The temporary restraining order was extended and a hearing was set on the application of the plaintiff for a preliminary injunction. Subsequent thereto, the Court entered an order allowing Maxson to intervene, and the defendants filed motions to dissolve the temporary restraining order, to oppose the order allowing Maxson to intervene and to dismiss or, in the alternative, for a summary judgment. Affidavits were filed by all parties and portions of the pertinent records of the Executive Department were made exhibits to certain affidavits.

The United States Army, through its Munitions Division in Joliet, Illinois, issued a solicitation for bids on June 21, 1971, for the procurement and delivery of a quantity of 81MM shells to be delivered to Vietnam. An Invitation for Bids, consisting of 79 pages, set forth the requirements and specifications for the bidder. That Invitation required each bidder to submit, inter alia, a unit price per shell and a guaranteed shipping cost proposed by the bidder for delivery of the shells to Vietnam. The bids were opened on August 2, 1971, and plaintiff was the low bidder on the unit price per shell. The next lowest bidder on the unit price per shell was Maxson. Pursuant to regulations, the Invitation to Bid and practice, the Pro-

curing Contracting Officer caused an analysis of the bids to be made. This analysis involved a consideration of the guaranteed transportation costs and a subsequent application of those guaranteed costs to the unit price. Page 5 of the 79 pages of the Invitation to Bid is a form entitled "Guaranteed Maximum Shipping Data for F.O.B. Origin Deliveries" (Ex. 1 to Affidavit of Peter Pace). In this form the bidder is "requested" to set forth the data that the bidder used in determining the guaranteed transportation costs. The form provides that if the bidder does not furnish sufficient shipping data to permit a determination by the government of the shipping costs, the evaluation may be based on the highest transportation costs submitted by any bidder or, in the absence thereof, as may otherwise be established by the government. It is further provided that if the actual transportation cost exceeds the guaranteed cost, the contract price shall be reduced by the difference between the actual and the guaranteed cost. The primary dispute in this case arises over the fact that the data set forth by Maxson for the size and weight of certain wooden pallets needed in the transportation and to be furnished by the bidder was deliberately underestimated to effect a better competitive price. Maxson used data for the size of the pallet of a 4" dimension, whereas, technical drawings referred to in the Invitation to Bid required a minimum height of 6⅛" (Ex. 18 to Affidavit Peter Pace). When this erroneous factor was applied to the unit price it caused the defendant Contracting Officer to determine that the bid should be awarded to Maxson.

Pace protested the ruling, and subsequent thereto the defendant Procuring Contracting Officer filed Findings and Recommendations, memorandum of law relative to the protest of the plaintiff, signed by counsel for the legal office of the Procurement Law Division and a letter from the Deputy General Counsel from the United States Ma-

teriel Command to the Comptroller General. The contentions of Pace as a protestant were overruled, and the defendants have determined that the contract should be awarded to Maxson subject to a Capability Survey of Maxson. In this regard, at the oral hearing in this Court it was indicated by counsel that the protest of Pace has not been ruled upon by the Comptroller General of the United States due to the policy of the Comptroller General to discontinue further action upon the issuance of a Temporary Restraining Order.

It is the position of the defendants and the intervenor, Maxson, that the deliberate or careless understatement of transportation cost data is a pricing technique whereby certain bidders offer the lowest competitive price (Affidavits of E. F. Hill and Steve K. Ferrell). In the instant case, Maxson admits that it knowingly submitted data for the transportation cost evaluation which did not represent the accurate dimensions for packaging and unitization required during the contract performance (Affidavit of Steve K. Ferrell, Director of Purchasing and Estimating for Maxson Ordnance Division, Par. 6, p. 3). The defendant Procuring Contracting Officer knew that this was mis-stated by Maxson. He further found that this procedure is an accepted practice which is evident by this procurement because the other bidders also used this technique in other respects (Findings and Recommendations, 8-18-71, Exhibit 9 to Affidavit of Peter Pace). Pace denies that it deliberately underestimated its data in this instance or in prior instances (Affidavit of John J. Pechak). Maxson did expect Army personnel to require compliance with the contract and it expected to provide the pallets required by the specifications in spite of its deliberately false data.

Jurisdiction exists pursuant to the Administrative Procedure Act. *Abbott Laboratories v. Gardner*, 387 U.S. 136,

141 (1967). Venue appears to be appropriate in this district. *Upjohn v. Finch*, 303 F. Supp. 241 (W.D. Mich. 1969). Furthermore, plaintiff as a bidder has a standing to seek the relief herein sought. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859. (C.A. D.C. 1970).

The scope of this Court's review is set forth in 5 USC., §706, which provides, in part, as follows:

> "706. Scope of Review. To the extent necessary to decision and when presented, the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine applicability of the terms of an agency action. The reviewing court shall——
>
> . . . . . .
>
> holding unlawful and set aside agency action findings and conclusions found to be——
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

The Armed Services Procurement Act, 10 USC, § 2305 (b), provides, in part, as follows:

> "The specifications in Invitations for Bids must contain the necessary language and attachments and must be sufficiently descriptive in language and attachments to permit full and free competition."

The Armed Services Procurement Regulations provide, in part, as follows:

> "*Section 2-301*
>
> "(a) To be considered for award, a bid must comply in all material respects with the invitation for bids so that both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and

the integrity of the formal advertising system may be maintained." 32 C.F.R., § 2.301 (a) (1960).

The Court should be properly concerned that procurement activities of the government be carried out in accordance with applicable statutes and agency regulations. See *M. Steinthal & Co., Inc. v. Seamans*, ... F.2d ... (No. 24,595 C.A. D.C. 10-14-71). Arbitrariness and capriciousness within the meaning of the Administrative Procedure Act exists if the action lacks a rational basis. *L&NRR Co. v. United States*, 268 F.Supp. 71 (3-Judge Court W.D. Ky. 1967); *M. Steinthal & Co., Inc. v. Seamans, supra.*

This Court concludes that there is no rational basis for the Contracting Officer to award a contract which is based upon a bid which deliberately understated the size of a pallet set forth with particularity in the Invitation to Bid. Therefore, this would constitute arbitrary and capricious agency action.

The Court further concludes that the amount by which the data was understated, namely four inches when the specifications call for a minimum of six and one-eighth inches, is material to an extent that an award based upon this would be an abuse of discretion, particularly in view of the Contracting Officer's prior knowledge of this deliberate act.

The Court further concludes that an award of the contract would be a violation of the Armed Services Procurement Regulations § 2.301; 32 C.F.R. § 2.301(a) (1960). In matters of this sort these regulations have the effect of law. *M. Steinthal & Co., Inc. v. Seamans, supra.* This regulation is violated because the bid does not "comply in all material respects" and in this Court's opinion "the integrity of the formal advertising system" would not be maintained.

Because the plaintiff is the apparent next lowest bidder, it will suffer irreparable injury if the defendants are not enjoined from awarding the contract to Maxson and a preliminary injunction is granted the plaintiffs. This Court does not direct that the contract be awarded to Pace. This shall be determined by the defendants in accordance with the Invitation to Bid and the laws and regulations properly applied to matters of this sort.

This 26th day of October, 1971.

ROBERT M. McRAE, JR.
United States District Judge

APPENDIX 2

In the United States District Court
for the Western District of Tennessee
Western Division

Pace Co., Division of Ambac Industries, Incorporated, Plaintiff, vs. Department of the Army of the United States of America, et al., Defendants, and Maxson Ordnance Division, Maxson Electronics Corporation, a Riker-Maxson Subsidiary, Intervenor-Defendant.	Civil Action No. C-71-391

Preliminary Injunction

(Filed Nov. 1, 1971)

This cause came on to be heard on Plaintiff's application for a Preliminary Injunction, and the Court having considered the verified Complaint, the Affidavits submitted in support thereof and in opposition thereto, having considered the Memoranda of Authorities submitted by the respective parties, and having heard argument of counsel in open court, and it appearing to the Court after due deliberation that the Plaintiff is entitled to injunctive relief as requested in its Complaint, as supported by the

Findings of Fact and Conclusions of Law set forth in Memorandum Decision of the Court filed in this cause on October 26, 1971.

It Is, Therefore, Ordered that the Defendants herein, their agents, servants, employees and attorneys, be and they hereby are restrained and enjoined pending the final determination of this action from making an award to the Intervenor-Defendant, Maxson Ordnance Division, under IFB DAAA09-71-B0220, issued by the Department of the Army, Ammunition Procurement and Supply Agency, Joliet, Illinois, dated 21 June 1971, and that Plaintiff shall not be required to give security or bond.

This 1st day of October, 1971, effective October 22, 1971.

ROBERT M. McRAE
United States District Judge

O.K.

CHARLES M. CRUMP
Attorney for Plaintiff

J. N. MORRIS
Attorney for Defendants

WM. F. KIRSH
Attorney for Intervenor-Defendant

APPENDIX 3

In the United States District Court
for the Western District of Tennessee
Western Division

Pace Co., Division of Ambac Industries, Incorporated,
Plaintiff,
vs.
Department of the Army of the United States of America, et al.,
Defendants,
and
Maxson Ordnance Division, Maxson Electronics Corporation, a Riker-Maxson Subsidiary,
Intervenor-Defendant.

Civil Action No. C-71-391

Order Overruling Defendants' Motions for Dissolution of Temporary Restraining Order, to Dismiss, or, in the Alternative, for Summary Judgment

(Filed Nov. 1, 1971)

This cause came on to be heard upon the Complaint for Declaratory Judgment and Injunction; Plaintiff's application for a Preliminary Injunction specially set pursuant to Order Extending Temporary Restraining Order, entered in this cause on October 8, 1971; upon the Motion of the Defendants for Dissolution of Temporary Restraining Order to Dismiss, or in the Alternative, for Summary Judgment upon the Answer of the Intervenor Defendant

upon the Affidavit of Peter W. Pace, John J. Pechak and Robert T. Findley, filed on behalf of the Plaintiff; upon the Affidavit of Edward F. Hill, dated October 14, 1971, and upon Affidavit of Gordon Huber, dated October 20, 1971, filed on behalf of the Defendants; upon the Affidavits of Steve K. Ferrell, Jr. and Salvatore J. Mira, filed on behalf of the Intervenor Defendant; upon the Memoranda of Authorities filed by the respective parties, and upon the appearance and argument in open Court of counsel for the respective parties, from all of which the Court has made Findings of Fact and Conclusions of Law incorporated in the Memorandum Decision of the Court filed in this cause on October 26, 1971.

It Is, Therefore, Ordered:

1. That the application of Plaintiff for a Preliminary Injunction, restraining the Defendants from making an award under IFB No. DAAA09-71-B-0220, to Maxson Ordnance Division, Maxson Electronics Corporation, a Riker-Maxson Subsidiary, is granted.

2. That the Motions of Defendants for Dissolution of Temporary Restraining Order and to Dismiss, or, in the Alternative, for Summary Judgment, are overruled.

ROBERT M. McRAE
United States District Judge

Dated: November 1, 1971.

O.K.

CHARLES M. CRUMP
Attorney for Plaintiff

J. N. MORRIS
Attorney for Defendants

WM. KIRSH, JR.
Attorney for Intervenor-Defendant

APPENDIX 4

United States Court of Appeals
for the Sixth Circuit

Pace Company, Division of Ambac Industries,
Plaintiff-Appellee,
v.
Stanley Resor, Secretary of the Army, et al.,
Defendant-Appellant.

Pace Company, Division of Ambac Industries,
Plaintiff-Appellee,
v.
Maxson Electronics Corporation,
Intervenor-Defendant
Appellant.

Nos. 71-1974 and 71-1975.

Appeal From the United States District Court, Western District of Tennessee

Decided and filed December 9, 1971.

Before: Phillips, Chief Judge, McCree and Kent, Circuit Judges.

Per Curiam. This is an appeal from orders of the District Court granting and refusing to vacate or stay a preliminary injunction restraining the defendant-appellant from awarding a contract to the intervenor-defendant-

appellant pursuant to an invitation for bids to furnish a quantity of 81MM shells for delivery to the United States Army in Vietnam.

We need not and do not reach the issue of whether the District Court had jurisdiction to issue the injunction pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C., § 706, at the request of plaintiff-appellee as a disappointed bidder. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Schanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir., 1970); *M. Steinthal & Co. v. Seamans* (D.C. Cir., Oct. 14, 1971). Neither do we reach the issue as to whether the granting of the injunction was a proper exercise of the discretion of the trial court. We do not reach these issues because we conclude that the District Court abused its discretion in not vacating the injunction upon the representation by the Secretary of the Army that the National welfare will be materially affected by the injunction. On the basis of the affidavits on file we find the National interest to be of such overriding importance as to render the failure to vacate the injunction an abuse of discretion.

We have not been cited any authority in which any Court of the United States has enjoined the acquisition of munitions after a responsible officer has certified such munitions as necessary for support of troops engaged in military operations.

The cause is remanded to the District Court with instructions to vacate the injunction.

APPENDIX 5

In the United States Court of Appeals
for the Sixth Circuit

Pace Co., Division of Ambac Industries, Incorporated, Plaintiff-Appellee, vs. Stanley Resor, Secretary of the Army, et al., Defendants-Appellants.	No. 71-1974
Pace Co., Division of Ambac Industries, Incorporated, Plaintiff-Appellee, vs. Maxson Electronics Corporation, Intervenor-Defendant-Appellant.	No. 71-1975

Petition for Rehearing

The Appellee Pace Co., petitions this Honorable Court for Rehearing of its Per Curiam decision filed December 9, 1971, in the above-entitled case, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and in support thereof, respectfully shows:

1. This Court found that the District Court abused its discretion in not vacating the injunction enjoining the Governmental Defendants from making an award to the Intervenor-Defendant-Appellant, Maxson under the Invi-

tation for Bids issued by the Department of the Army involved in this case on the basis of affidavits by officers and employees of the Governmental Defendants, representing that the national welfare will be materially affected by the District Court's Injunction.

It is respectfully submitted that this Court overlooked the fact that the District Court considered this issue at a hearing on Defendants' Motion to Stay, at which all parties were represented by counsel, and the District Court found, *upon uncontroverted facts in the record*, that other avenues of procuring the munitions *in accordance with law* were open to the Defendants. These avenues, *which are still open to the Defendants*, include the following:

(a) By award of a contract under the subject Invitation for Bid to "the responsible bidder whose bid *conforms to the Invitation* and will be the most advantageous to the United States, price and other factors considered". 10 USC 2305(c) [Emphasis Added]. There were eight other bidders under this Invitation to Bid. The Army has requested extension of time for acceptance of bids to January 29, 1972 (Affidavit, Pechak, Exh. C, F).

(b) By cancellation of the subject IFB and readvertising. Armed Services Procurement Regulations 2-404.1(f).

(c) Through negotiation, if "public exigency will not permit the delay incident to advertising". 10 USC 2304(a)(2).

(d) By exercise of option under the current Olin Contract, DAAA09-71-C-0240 with option quantity of 467,532 items, of which the Army in November, 1971, exercised its option to procure 342,196 items (Affidavit, Hill, December 3, 1971, p. 3). The quantity in the subject IFB is 661,880 items.

2. Appellee Pace would show that nothing in the District Court's Injunction prevents the Defendants from awarding a *lawful* contract under any of the above four procedures. Appellee Pace would further show that Defendants have failed to address themselves to these very essential and uncontradicted facts, which *negate* the allegation that the District Court's Injunction—which only enjoins the award of an *illegal* contract *to Maxson under this IFB*—in any way affects the national welfare. As pointed out, the Armed Services Procurement Act provides means for the *lawful* acquisition of munitions to fill urgent needs in times of emergency, and there has been no showing why the Defendants should be permitted to resort to *unlawful* means of procurement in this case.

3. It is contended by Appellee Pace that the Per Curium Opinion represents a dangerous precedent in that it creates an exception to or suspends the requirements of the Armed Services Procurement Act (10 UCS § 2301, et seq.) as well as the scope of judicial review under the Administrative Procedure Act (5 USC § 701, et seq.) with respect to all acquisition of munitions by Governmental agencies, although *no such exceptions were written into these laws by the Congress.*

4. Appellee Pace would further point out to the Court that the last affidavit filed by the Government, being that of Brigadier General Frank A. Hinrichs of December 2, 1971, in which it is conceded that no critical shortage of the 81MM cartridges will be experienced if an award can be made under the IFB as late as the end of December, contradicts the Defendants' position defailed in affidavits filed on behalf of the Defendants in October, 1971, that enjoining the unlawful award of the contract under this IFB gravely affects the Army's performance of its defense functions (Government's Motion, p. 28).

Again, Appellee Pace urges the Court to consider the *uncontroverted fact* that if at any time in the judgment of the Secretary of the Army, it appears that a critical shortage of these cartridges is imminent, any of the four lawful avenues outlined above are open to the Department of the Army to assure an adequate supply of the cartridges. For this reason, and in order to preserve the integrity of the competitive bid system with respect to procurement of munitions by Governmental agencies; it is submitted that the District Court's Injunction preventing an *unlawful award to Maxson under this IFB* should be upheld.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted; that, upon further consideration, the Defendants' Motions for Summary Reversal or Stay be denied; and that the District Court's Injunction be sustained and this cause remanded for issuance of a permanent injunction, or, in the event this Petition is denied, that an order be entered staying the issuance of mandate in this case for thirty (30) days, under the provisions of 28 USC §2101(f) and Rule 41(b) of the Federal Rules of Appellate Procedure, because, in the event this Petition is denied, it is the bona fide intention of Appellee Pace to make proper and timely application to the Supreme Court of the United States for Writ of Certiorari.

Respectfully submitted

APPERSON, CRUMP, DUZANE & MAXWELL
Suite 2610, 100 N. Main Building
Memphis, Tennessee 38103
By CHARLES M. CRUMP
Attorneys for Plaintiff-Appellee

Certificate of Service

The undersigned certifies that this Petition has been served upon the Defendants-Appellants and the Intervenor-Defendant-Appellant by mailing a copy to following attorneys of record for the respective parties:

Robert E. Kopp
L. Patrick Gray, III
Department of Justice
Washington, D. C. 20530

Robert Ackerly
Sellers, Connor & Cuneo
1625 K Street, N.W.
Washington, D. C. 20006

This 10th day of December, 1971,

Charles M. Crump

APPENDIX 6

In the United States Court of Appeals
For the Sixth Circuit

Pace Co., Division of AMBAC Industries, Incorporated, Plaintiff-Appellee, v. Stanley Resor, Secretary of the Army, et al., Defendants-Appellants, and Maxson Electronics Corporation, Intervenor-Defendant-Appellant.	Nos. 71-1974 and 71-1975.

Motion to Accelerate Mandate

Defendants-appellants, the Secretary of the Army, et al., hereby move pursuant to Rule 41, F.R.A.P., for immediate issuance of the mandate of this Court in accordance with its judgment of December 9, 1971, remanding the cause to the district court with instructions to vacate the injunction. As recognized by this Court in its decision of December 9, the affidavits on file establish that the national interest here is of such "overriding importance" as to establish that the district court abused its discretion in entering the preliminary injunction. Therefore, the mandate should be issued at once.

Respectfully submitted

/s/ WALTER H. FLEISCHER
/s/ ROBERT E. KOPP
Attorneys
Department of Justice
Washington, D. C. 20530

APPENDIX 7

United States Court of Appeals
For the Sixth Circuit

Pace Co., Division of AMBAC Industries, Incorporated, Plaintiff-Appellee, vs. Stanley Resor, Secretary of the Army, et al., Defendant-Appellant.	Nos. 71-1974 and 71-1975.
Pace Co., Division of AMBAC Industries, Incorporated, Plaintiff-Appellee, vs. Maxson Electronics Corporation, Intervenor-Defendant-Appellant.	

Appeal from the United States District Court,
Western District of Tennessee

Decided and filed December 15, 1971

Before: Phillips, Chief Judge, McCree and Kent, Circuit Judges.

The Defendants-Appellants have filed a Motion Praying for the immediate issuance of the Court's Mandate in this case. Appellee has filed a Motion for Rehearing, or, in the Alternative, that the Motion be stayed for thirty

days to permit the Appellee to make application to the Supreme Court of the United States for a Writ of Certiorari.

Upon consideration of the Motion and the Petition for Rehearing,

It Is Ordered, That the Petition for Rehearing be and it is hereby denied.

It Is Further Ordered, That the Petition for immediate issuance of the Court's mandate be denied.

It Is Further Ordered, That the issuance of the mandate be delayed until the 29th day of December, 1971, to afford Appellee an opportunity to present the matter to Mr. Justice Potter Stewart, the Circuit Justice for the Sixth Circuit.

Entered by Order of the Court.

/s/ JAMES A. HIGGINS
Clerk

Supreme Court, U.S.
JAN 20 1972
E. ROBERT SEAVER, CLERK

No. 71-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

ROBERT F. FROEHLKE, Secretary of the Army, ET AL., *Defendants-Respondents.*

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

MAXSON ELECTRONICS CORPORATION, *Intervenor Defendant-Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT MAXSON ELECTRONICS CORPORATION IN OPPOSITION TO PETITION

Of Counsel:

ROBERT L. ACKERLY
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006

GILBERT A. CUNEO
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-818

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

ROBERT F. FROEHLKE, Secretary of the Army, ET AL., *Defendants-Respondents.*

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, *Plaintiff-Petitioner,*

v.

MAXSON ELECTRONICS CORPORATION, *Intervenor-Defendant-Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT MAXSON ELECTRONICS CORPORATION IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinions delivered in the courts below are not as yet officially reported but have been appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

The sole question presented is whether the United States Court of Appeals for the Sixth Circuit correctly determined that the District Court had abused its discretion by enjoining the Secretary of the Army from proceeding with a necessary procurement of munitions notwithstanding the representation by the Secretary of the Army that the national welfare would be materially affected by the injunction.

STATUTES AND REGULATIONS

The relevant portions of the Armed Services Procurement Regulations (ASPR), 32 C.F.R. Parts 1-8, the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706 (1971), and the Armed Services Procurement Act, 10 U.S.C. §§ 2304(a)(2) and 2305 (1971); are set forth in the Petition (Petition 4-7).

STATEMENT OF THE CASE

This case arises out of competitive bidding for a Government procurement of 81 MM shells for use in Vietnam. The Secretary of the Army, acting through the Munitions Division of the United States Army at Joliet, Illinois, issued an Invitation for Bids on June 21, 1971 for the production and delivery of a quantity of 81 MM illuminating cartridges. Nine companies submitted bids pursuant to the Invitation. The price was to be determined by adding the bid price for the shells to the bidder's guaranteed cost of transportation of the shells to Vietnam. The transportation costs

were calculated by the Army based upon certain data furnished by the bidder. Each bidder furnished estimated measurements and weights for the shipping cartons which varied, with no two bidders submitting identical data. The data were submitted on a form entitled "Guaranteed Maximum Shipping Data For F.O.B. Origin Deliveries." The form provided that if the bidder submitted no data that bid would be evaluated by adding the highest transportation costs calculated from those bidders who did submit data. The purpose of these data was to permit the Army to calculate as a bid factor the bidder's guaranteed shipping costs. If the cost to the Army of shipping the shells from the place of manufacture to Vietnam exceeded the transportation costs guaranteed by the bidder, the contract price was to be reduced by the excess of such costs.

Maxson Electronics Corporation (Intervenor-Defendant below and Respondent here) was determined by the Contracting Officer to be the low bidder for this procurement. Petitioner first filed a protest with the Comptroller General challenging the Maxson bid, but before the Comptroller General had acted, filed a complaint in the District Court and received a temporary restraining order without notice restraining the award of the contract to Maxson. The District Court thereafter entered a preliminary injunction. The Secretary of the Army moved to dissolve the injunction supporting the motion with an affidavit representing that the shells were urgently needed and that continuation of the injunction would impair the public interest by interfering with the continued flow of munitions for use in Vietnam. The District Court denied the motion to dissolve the injunction.

The Respondents filed an Application for a Stay with the Sixth Circuit Court of Appeals along with a Motion for Summary Reversal. After oral argument on December 6, 1971, the Court of Appeals held *per curiam* on December 9, 1971 that the District Court's failure to vacate the injunction upon the representation of the Secretary of the Army that the national welfare would be materially affected by the injunction was an abuse of discretion. The Court specifically declined to consider any other issues presented in the appeal. The case was remanded with instructions to vacate the injunction.

ARGUMENT

The question presented by this Petition does not raise the issue of jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 706 (1971), since the District Court entertained jurisdiction and the issue was not reached by the Court of Appeals. The case thus remains in the District Court for further proceedings on the merits. The sole question here is the propriety of the District Court's refusal to dissolve a preliminary injunction enjoining the Secretary of the Army from proceeding with the procurement of urgently needed munitions for use in Vietnam pending hearing on the merits of the complaint. The Court of Appeals held that the refusal to dissolve the injunction was an abuse of discretion.

This Court held, almost 28 years ago, in *Yakus* v. *United States*, 321 U.S. 414 (1944):

> But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest

> withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. [p. 440]

Petitioner is not entitled to a preliminary injunction as a matter of right even though irreparable injury is alleged. *Ibid.* This rule is particularly applicable here where Petitioner, if it is successful, may recover damages in the United States Court of Claims even though the District Court would not have jurisdiction to award damages in excess of $10,000. Although Petitioner did not seek damages in its complaint, the Court of Claims has clearly held that damages will be awarded to a bidder who was improperly denied an award of a Government contract.*

The United States Court of Appeals for the District of Columbia, the appellate court which has by far the most experience with actions brought by a disappointed bidder for a Government contract, recently held:

> It would be intolerable for any frustrated bidder to render uncertain for a prolonged period of time Government contracts which are vital to the functions performed by the sovereign. The frivolous lawsuit can, of course, be terminated swiftly by the summary judgment procedure in the Federal Rules of Civil Procedure. However, even assuming a colorable claim by the disappointed bidder, it does not follow that he is entitled to an evidentiary hearing and judicial determination of the merits of his claim before termination of the procurement process. [*Steinthal & Co. v. Seamans*, — F.2d —, No. 24,595 (D.C. Cir. Oct. 14, 1971) p. 26].

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* *Continental Business Enterprises, Inc. v. United States*, — Ct. Cl. —, — F.2d — (Dec. 10, 1971); *Keco Industries, Inc. v. United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

The court then concluded:

> However the public interest in a Government procurement process that proceeds with expedition is likewise of importance. The court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis. [*Id.* at 31-32]

Where a temporary injunction has an adverse impact on the public interest and interferes with the right of a sovereign to procure urgently needed munitions, there is an abuse of discretion in the refusal to dissolve the injunction. Clearly this proposition is sound when Petitioner has a remedy at law—an action for money damages in the United States Court of Claims.

Petitioner suggests to the Court that there may be a conflict among the Circuits as a result of the decision of the Sixth Circuit Court of Appeals below. In fact the Circuits are surprisingly uniform in their reluctance to allow an injunction to stand where it interferes with the Government procurement processes. In *Steinthal & Co.* v. *Seamans, supra;* and *Wheelabrator Corp.* v. *Chaffee*, — F.2d —, Nos. 24,705, 24,729 (D.C. Cir. Oct. 14, 1971), where the District Courts had entered injunctions at the request of disappointed bidders, the Court of Appeals for the District of Columbia summarily reversed both decisions and directed that the injunctions be dissolved. Similarly, the Fifth Circuit Court of Appeals in *Hayes International Corp.* v. *Seamans*, — F.2d —, No. 71-1369 (5th Cir. Oct. 15, 1971), where the District Court had entered an injunction to stay the procurement process pending a hearing on the merits, entered a stay of the injunction without oral argument permitting the Government procurement to proceed without delay. There is thus no sub-

stantial question presented by the Petition upon which this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

GILBERT A. CUNEO
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent Marson Electronics Corporation

Of Counsel:

ROBERT L. ACKERLY
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006

DATED: January 20, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-818

PACE CO., DIVISION OF AMBAC INDUSTRIES, INCORPORATED, PETITIONER

v.

ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In June 1971, the Army issued an Invitation for Bids for the procurement of 81 milimeter cartridges to be delivered to Vietnam, commencing in April 1972 (Hill affidavit of October 23, 1971).[1] The contract was FOB origin, with the Army paying the actual shipping cost from the place of manufacture to Vietnam. Each bidder was "requested" to submit "Guaranteed Maxi-

[1] The various affidavits referred to herein were introduced by the Government below and are a part of the record in this case.

mum Shipping Data" for purpose of estimating the Army's transportation cost. If the actual shipping cost to the Army exceeded the estimated cost under the winning bid, it was agreed that the successful bidder would reimburse the Army for the difference (by a deduction from the contract price).[2] Nine firms, including petitioner, responded to the Invitation.

Upon evaluating all the bids, the Army decided to award the contract to Maxson Electronics Corporation ("Maxson") (Hill affidavit of October 14, 1971). Petitioner then lodged a protest with the Army and the Comptroller General (Hill affidavit of October 14, 1971). Shortly thereafter, on September 30, 1971, it commenced the present suit in the United States District Court for the Western District of Tennessee, seeking to enjoin the award on the ground that Maxson's

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[2] The Invitation for Bids stated:

GUARANTEED MAXIMUM SHIPPING DATA FOR F.O.B. ORIGIN DELIVERIES

The offeror is requested to complete the following Guaranteed Maximum Shipping Data for use in determination of transportation costs. If the offeror does not furnish sufficient shipping data as set forth in the Guaranteed Maximum Shipping Data to permit determination by the Government of the item shipping cost, evaluation will be based on the highest transportation cost producing shipping data submitted by any offeror or, in the absence thereof, as may otherwise be established by the Government. If the item shipping cost based on actual shipping data exceeds the item shipping cost as computed from the data indicated below or as set forth above for evaluation purposes, the offeror agrees that the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes and the transportation costs that should have been used for evaluation purposes based on correct shipping data.

bid contained deliberately inaccurate shipping data,[3] and hence that the Army's acceptance of it was unlawful.

The district court preliminarily enjoined the Army from awarding the contract to Maxson.[4] Respondents promptly moved to vacate that order, informing the court that each day of delay aggravated an already acute shortage of ammunition for American combat troops in Vietnam and resulted in increased costs to the government (Hill affidavit of October 23, 1971). The district court refused to vacate and to require petitioner to post bond.

Respondents appealed, requesting summary reversal of the preliminary injunction. In supplemental affidavits filed with the court of appeals, they advised that the delay in awarding this contract, coupled with new ammunition shortages arising from the failure of another producer, had forced the Army to exercise an option under an existing ammunitions contract on terms not nearly so favorable as those under the Maxson contract. The additional costs incurred would be well over one million dollars. See Hill affidavits of December 3 and December 6, 1971; Hinrichs affidavit of December 2, 1971.

The court of appeals remanded the case to the district court with directions to vacate the preliminary

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[3] Maxson submitted cost data for 4" wooden pallets needed in the transportation, rather than using the 6⅛" wooden pallets called for in the Invitation for Bids.

[4] The district court orally announced the preliminary injunction on October 22, 1971. The written order to that effect was not actually entered until November 1, 1971 (Pet. App. A-8).

injunction. The Sixth Circuit held (Pet. App. A-13) that the district court had "abused its discretion in not vacating the injunction upon the representation by the Secretary of the Army that the National welfare will be materially affected by the injunction." It stated (*ibid.*): "On the basis of the affidavits on file we find the National interest to be of such overriding importance as to render the failure to vacate the injunction an abuse of discretion."

The court of appeals denied a petition for rehearing, and ordered that the mandate issue on December 29, 1971, unless stayed by this Court (Pet. App. A-20). On December 22, 1971, Mr. Justice Stewart, and on December 30, 1971, the Chief Justice, denied a stay.

1. Petitioner seeks to reinstate the district court's preliminary injunction against an award to Maxson of the ammunitions contract involved in this case. But, following issuance of the mandate of the court of appeals on December 29, 1971, after Mr. Justice Stewart denied a stay, the Army awarded the contract to Maxson. Thus, the issue raised in the petition is now moot; there is no cause for review by this Court.

2. Moreover the court of appeals properly determined that the district court—by failing to give sufficient weight to Army affidavits showing the substantial harm to the national interest that would result from preliminarily enjoining consummation of the munitions contract with Maxson—abused its discretion in refusing to vacate the preliminary injunction. Respondents' affidavits explained that there was a shortage of this type of ammunition in Vietnam, that it was only available in limited quantity, and then only at a much higher cost. Petitioner does not dispute

these facts; it merely objects that the court of appeals relied on them. But, as that court pointed out (Pet. App. A-13), petitioner has not "cited any authority in which any Court of the United States has enjoined the acquisition of munitions after a responsible officer has certified such munitions as necessary for support of troops engaged in military operations."

Nor was there reason for any such injunction in this case. Maxson's bid price was understated only in terms of the shipping costs. But since bidders guaranteed the maximum shipping cost (*supra*, n. 2), this error had no bearing on the overall cost to the Army; Maxson had to pay the additional transportation expense.[5] It was, therefore, not improper for the Army to accept Maxson's bid notwithstanding the error.[6]

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[5] Recent opinions of the Comptroller General have held such variations in shipping costs to be immaterial. *E.g.*, B-153323 (May 7, 1964); B-165181 (Nov. 25, 1968); B-164868 (Nov. 22, 1968); B-167946 (Feb. 17, 1970); B-167868 (Apr. 22, 1970); B-172899 (Aug. 23, 1971, reaffirmed on reconsideration, Nov. 12, 1971). These opinions were attached to the "Government Appellants' Reply to Appellee's Opposition to Motion for Summary Reversal, Etc.," filed in the court of appeals.

[6] Petitioner contends (Pet. 11-12) that the decision below conflicts with decisions by the District of Columbia Circuit recognizing "the right of a disappointed bidder to seek review of agency action" under the Administrative Procedure Act (5 U.S.C. 706). See *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859 (C.A. D.C.); *Wheelabrator Corporation* v. *Chafee*, C.A.D.C., No. 24,705, decided January 26, 1971. Whatever view one takes of those decisions (see, *e.g.*, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113), however, this is not a proper case in which to review the jurisdictional question that they decided. Here, the Sixth Circuit explicitly stated (Pet. App., A-13): "We need not and do not reach the issue of whether the District Court had jurisdiction to issue the injunction pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 706, at the request of [petitioner] as a disappointed bidder."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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